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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-978

TIMM-D.C. INC.,
Petitioner,

vs.

PAUL M. GARRETT, Trustee in Bankruptcy for Metropolitan Shippers' Clearing Corporation of Washington,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Respectfully submitted,
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PEATE PRINTING COMPANY SEATTLE, WASHINGTON

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

TIME-D.C., Inc., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals entered in the above-entitled case on November 8, 1974, which case is now reported as 502 Fed. (2d) 627.

Opinions Below

Review is requested of the following Orders and Decisions of the federal courts:

1) The final order of the Ninth Circuit Court of Appeals in its Docket No. 72-3042, dated November 6, 1974, and filed on November 8, 1974.

Which order denied petitioner TIME-D.C.'s petition for rehearing and for hearing En Banc. That order is attached hereto as Appendix A, infra, page A-1.

2) Of the opinion of the Ninth Circuit Court of Appeals in its Docket No. 72-3942 filed and entered on August 14, 1974, which opinion was the court's judgment reversing and remanding the Memorandum Decision of the United States District Court for the Western District of Washington described below. That court's opinion reported as 502 Fed. (2d) 627 is incorporated in this petition as Appendix B attached hereto, infra, page B-1.

3) Of the Order of the Ninth Circuit Court entered June 4, 1974, allowing the trustee in bankruptcy, Paul M. Garrett to be substituted as appellant for the original plaintiff. That order is attached hereto as Appendix C, infra, page C-1.

4) Of the Order of the Ninth Circuit Court entered October 23, 1974, denying petitioner's motion to dismiss the appeal. That order is attached hereto as Appendix D, infra, page D-1.

5) Of the Memorandum Decision in Cause No. 246-72C2 entered by the Honorable William N. Goodwin, Judge of the United States District Court for the Western District of Washington dated the 19th day of September, 1972, and filed on the same date. That court's decision is included herein as Appendix E, infra, page E-1.

Jurisdiction

The judgment of the Ninth Circuit Court of Appeals (Appendix B, infra, page B-1) was entered on August 14, 1974. A timely petition for rehearing was denied on November 8, 1974, (Appendix A, infra, page A-1). The jurisdiction of this court is in-

voked under Article III, Section 2, Clause 1 of the United States Constitution which states in part:

> "The judicial power shall extend to all Cases in Law and Equity, arising under the Constitution, the Laws of the United States, . . ."

Jurisdiction further lies pursuant to the terms of Article III, Section 2, Clause 2 of the United States Constitution that provides:

> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Jurisdiction also lies in this court under the provisions of the following statutes:

(a)

28 USC 2101 (c) which statute states in part:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

(b)

28 USC 1254 which reads in part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal

case, before or after rendition of judgment or decree; . . ."

Questions Presented

(a)

The legal question presented to this court for review is whether a motor common carrier subject to the tariff publication provisions of Title 49 USC 316, et seq, which carrier has inadvertently overcharged a shipper and which carrier has remitted the amount of said overcharge must remit in addition to said overcharge, interest determined as a percentage of the amount of overcharge.

(b)

The jurisdictional question presented is whether a shipper has standing in the federal courts to sue to recover interest on overcharges alone or to obtain declaratory relief when said interest amount if recoverable is less than $10,000 and is in fact only two hundred twenty dollars and eighty nine cents ($220.89) and when jurisdiction is founded on the assertion that interest on an overcharge is an integral part of the rate itself, thereby giving to the courts original jurisdiction under 28 USC 1337.

(c)

May the Court of Appeals allow the substitution for the original party to an action a receiver in bankruptcy who's participation in the proceeding is conditioned, pursuant to an order of the Referee in Bankruptcy, upon the basis that the litigation be pursued ". . . to final disposition on appeal in the Ninth Circuit Court of Appeals with no expense, costs or attorney's fees to be borne by the bankrupt estate." (See Appendix F attached hereto, infra, page F-1).

Statutes Involved

The federal statutes involved in the proceedings before the Ninth Circuit Court of Appeals and the United States District Court for the Western District of Washington are:

28 USC 1337

1337. Commerce and anti-trust regulations.—The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. (June 25, 1948, c. 646, § 1, 62 Stat. 931.)

28 USC 1961

Section 1961. Interest.—Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law. (June 25, 1948, c. 646, § 1, 62 Stat. 957.)

28 USC 2201

Section 2201. Creation of remedy.—In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. (June 25, 1948, c. 646, § 1, 62 Stat. 964; May 24, 1949, c. 139 § 111, 6 2Stat. 105;

Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, P. L. 85-508, § 12 (p), 72 Stat. 349.)

28 USC 2202

2202. Further relief.—Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. (June 25, 1948, c. 646, § 1, 62 Stat. 964.)

49 USC 41

This statute is set forth in the appendix to this petition as Appendix G, infra, page G-1. The statute is generally known as the Elkins Act and makes it a crime to offer transportation at less than the published rate or to receive a rebate or advantage in respect to goods tendered for interstate transportation.

49 USC 304(a)

304. General duties and powers of the Commission.—(a) Powers and duties generally. It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part [§§ 301-305, 306-327 of this title], and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

49 USC 316

316. Rates, fares, and charges.—(a) Duty to establish reasonable rates, fares, and charges—Service and equipment—Rules and regulations—Reasonable divisions of joint fares. It shall be the

duty of every common carrier of passengers by motor vehicle to establish reasonable through routes with other such common carriers and to provide safe and adequate service, equipment, and facilities for the transportation of passengers in interstate or foreign commerce; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable regulations and practices relating thereto, and to the issuance, form, and substance of tickets, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the transportation of passengers in interstate or foreign commerce; and in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(b) Rates, facilities for carriers of property. It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

49 USC 317(a)

317. Tariffs of common carriers by motor vehicle.—(a) Filing, posting, and publication. Every common carrier by motor vehicle shall file with

the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

49 USC 317 (b)

(b) Deviation from rates and regulations enumerated in tariff forbidden—Undue preferences. No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs: Provided, That the provisions of sections 1(7) and 22 of part I [§§ 1(7) and 22 of

this title] shall apply to common carriers by motor vehicles subject to this part [§§ 301-305, 306-327 of this title].

Statement

(a)

This suit was instituted by the respondent as plaintiff in the district court below for a declaratory judgment. Respondent, contending that TIME-D.C., petitioner here, and defendant in the district court, had refused to pay upon demand interest at six per cent per annum on overcharge claims. Respondent, as the asignee of various shippers, contends that there is owing to it the sum of two hundred twenty dollars and eighty nine cents ($220.89).

Petitioner, the record shows, had made the overcharge through inadvertence and had remitted said overcharges prior to suit. The refusal of petitioner to pay interest is based upon its belief that it is prohibited by law from charging or receiving anything other than the published tariff rate which does not provide for the payment of interest.

The district court's judgment dismissing the original complaint was based upon 28 USC 1331. The court held that the amount in controversy was not a sufficient amount to confer jurisdiction and that Section 2201 of Title 28 did not afford an independent basis of jurisdiction. This in effect was a rejection of respondent's contention that it had jurisdiction in the court based upon 28 USC 1337. Section 1337 jurisdiction was urged on the basis, as argued, that interest on an overcharge (but not an undercharge) was an integral part of the rate itself and since a shipper could maintain an action in the federal courts for overcharges under Section 1337, the

shipper could also maintain such an action for interest alone. Respondent, asserting jurisdiction on this basis sought to have the court declare, under the authority of Section 2201 that in the future motor carriers subject to rate regulation under Title 49 of the United States Code, must remit along with overcharges, interest.

Although no evidence was taken, affidavits of petitioner filed in the district court stated that petitioner's practice of declining to pay interest was predicated not only on the law but upon long established industry practice. Respondent's complaint admitted this latter fact and established the further fact that the Interstate Commerce Commission itself was of the opinion that the law did not allow it jurisdiction to require interest payment on overcharges (See Appendix H, infra, page H-1).

The Ninth Circuit Court upon appeal reversed the district court and remanded the cause back to the district court for trial. The circuit court held that interest on overcharges should be paid as such interest was in fact a part of the rate itself. This conclusion also gave to the court jurisdiction under Section 1337 of Title 28.

Before reaching this conclusion, however, the court by its order of June 4, 1974, (Appendix C, infra, page C-1) allowed Paul M. Garrett, trustee in bankruptcy to be substituted as appellant in that court. By its order of October 23, 1974, (Appendix D, infra, page D-1). The court denied without comment TIME-DC.'s motion to dismiss the appeal which motion was predicated upon the fact that Mr. Garrett's authority as a substituted party was conditional. It was asserted also in the motion that Mr. Garrett, having no authority to incur costs or pay

attorney's fees, was not in fact a proper party to the suit and should not be substituted as a party under the limitations specified.

Argument

There is substantial federal question presented in this appeal. The opinion entered by the Ninth Circuit is based essentially on two lines of authority, i.e., upon cases such as *Fawley Motor Lines, Inc. v. Cavalier Poultry Corp.*, 235 F.2d 416, 419 (4th Cir. 1956) which case allowed interest as part of a judgment and upon rail reparation cases such as *Southern Pacific Co. v. Miller Abattoir Co.*, 454 F.2d 357 (1972).

Those cases are clearly distinguishable from the case at bar. Motor carrier cases such as *Fawley*, where interest on a judgment has been allowed, involved suits properly brought under Section 1337 of Title 28. An interpretation of a tariff provision or the proper application of a rate provision was in each instance the basis of suit. Interest was awarded on a judgment and not on the basis that it was part of a rate.

The rail cases are distinguishable in that they are essentially common law reparations cases as pointed out by the court in *TIME-D.C. vs. United States*, 359 U.S. 464, 3 L.Ed 2nd 952, 79 S.Ct. 904. The *TIME* case further established that motor carriers under part II of the act are bound exclusively by these tariffs and cannot deviate therefrom. Questions of reasonableness or unreasonableness of a motor carrier rate are questions not open to litigation.

The decision of the Ninth Circuit goes beyond the actual tariff rate or charge that has been filed and

approved by the Commission and holds that there is inherently in that rate or charge an incremental interest factor which applies only to overcharges. This holding is not in accord with the determination of the Interstate Commerce Commission itself and is not in accord with a substantial number of federal cases which hold that under Part II of the act nothing except the actual published rate may be charged or received. *T.I.M.E. v. United States,* supra; *Wholesale Grocers, Inc. v. United States,* 272 F.Supp. 274, and *C & P Motor Delivery Co. v. U.S.,* 150 F(2d) 250.

The substitution of Mr. Garrett as receiver for the original plaintiff is an act based upon the court's discretion. It is urged that the court abused its discretion. A party that is not willing to be bound by the court's orders to pay costs and that is not paying the expense of suit is not a party at all. Since the Circuit Courts order is one of remand for trial, the abuse in its order on substitution is clear.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

BOYD HARTMAN
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL M. GARRETT, Trustee in Bankruptcy for METROPOLITAN SHIPPERS' CLEARINGS CORP. OF WASHINGTON, *Appellant,* vs. TIME-D.C., INC., *Appellee.*	No. 72-3042 ORDER

Before: KILKENNY, TRASK and CHOY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Dated: November 6, 1974

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL M. GARRETT, Trustee in Bankruptcy for METROPOLITAN SHIPPERS' CLEARINGS CORP. OF WASHINGTON,

Appellant,

vs.

TIME-D.C., INC.,

Appellant.

No. 72-3042

OPINION

[August 14, 1974]

Appeal from the United States District Court for the Western District of Washington

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Before: KILKENNY, TRASK and CHOY, Circuit Judges.

CHOY, Circuit Judge:

This appeal presents the issue whether a claim that a motor carrier must pay pre-judgment interest on shipping charges that exceed Interstate Commerce Act limits is one "arising under an Act of Congress regulating commerce" so as to be within the jurisdiction of a federal district court under 28 U.S.C. § 1337.[1] The district court held it was not. We

1. Section 1337 provides:
The district courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

reverse and remand.

Paul M. Garrett, the trustee for the bankrupt Metropolitan Shippers' Clearings Corporations (MSCC), seeks a declaratory judgment that interest must be paid on shipping overcharges. The overcharges occurred when TIME-DC, a motor carrier, charged its customers, whether inadvertently or not, more than was specified in tariffs filed with the Interstate Commerce Commission (I.C.C.).

MSCC's business consisted of purchasing shipper's rights to collect overcharges, performing audits to determine if the motor carriers had charged more than permitted in the applicable tariffs, and then collecting the overcharges.[2]

Normally, collecting overpayments has occasioned no difficulty. When it has been the subject of repayment demands, TIME-DC, like other carriers obliged to remit overcharges under § 317(b) of the Interstate Commerce Act, 49 U.S.C. § 317(b), has refunded such charges routinely. However, it, as well as other carriers, has refused to pay any interest to compensate the shipper for retention of the monies during the period between the overpayments and the remittance of the excessive charges.

Garrett contends that the Interstate Commerce Act requires payment of interest because uncompensated retention of an overpayment is part and parcel of an overcharge. In support of his contention, he points to certain provisions in Part II of the Act, 49 U.S.C. §§ 301-27, governing interstate motor carriers. Under that Part a carrier is prohibited from collecting "a greater or less or different *com-*

2. In an affidavit an MSCC employee averred that there were $1,200 in overcharge claims pending against TIME-DC.

pensation for transportation" that set forth in its tariffs. 49 U.S.C. § 317(b) (emphasis added). A shipper may pursue a judicial action for "overcharges" (or a carrier an action for "undercharges" if less than the tariff has been collected). *See* 49 U.S.C. § 304a. "Overcharges" are defined as charges "in excess of those [provided] under the tariffs. . . ." 49 U.S.C. § 304a(6). Garrett argues that the carrier's "overcharge" or "compensation" is increased by the interest benefit inhering in retention of the overpayment until it is refunded. Thus, he concludes, the statute affords him a right to the preremittance interest.

The issue before us relates only to the presence of jurisdiction under § 1337. Since $10,000 is admittedly not in controversy, § 1331's parallel jurisdictional grant for cases "arising under the Constitution, treaties, or laws of the United States" is unavailable. Nonetheless, § 1331 does serve as a starting point since the "arising under" language in § 1337 is interpreted in essentially the same way as the "arising under" phrase in § 1331.[3] The test of what arises under an Act of Congress regulating commerce is therefore a familiar two-part one. *See generally T. B. Harms v. Eliscu*, 339 F.2d 823, 826-27 (2d Cir. 1964), *cert. denied* 381 U.S. 915 (1965); ALI, Division of Jurisdiction Between State and Federal Courts 177-79 (1969). It must appear either that the complaint seeks a remedy granted or properly inferable from

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3. *Russo v. Kirby*, 453 F.2d 548, 551 n.7 (2d Cir. 1971); *McFaddin Express Co. v. Adley Corp.*, 346 F.2d 424, 426 (2d Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966); *Eickhof Construction Co. v. Great Northern Ry.*, 291 F.Supp. 44, 46 (D. Minn. 1968); 1 J. Moore Federal Practice § .60 [8.—3] at 627-27 (2d ed. 1959); *see Carlson v. Coca Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973).

an act regulative of commerce, *see, e.g., American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916), or that the suit hinges on the interpretation of such an act of Congress. *See, e.g., Gully v. First National Bank*, 299 U.S. 109, 112 (1936); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921).

The cause of action seems to be squarely within the terms of this test. Garrett is claiming that certain provisions of the Interstate Commerce Act establish a duty on the part of motor carriers to pay pre-remittance interest; the question is whether such a duty can be inferred from the Act. Hence, the claim is one that vitally depends on the construction of a federal statute for its resolution.

Under the rule of *Bell v. Hood*, 327 U.S. 678 (1946), we need not definitely decide MSCC's claim. Our task under the rule is only to determine that the statutory issue is neither "frivolous or insubstantial," nor put forth solely to gain federal jurisdiction. *Id.* at 682-83.[4]

The claim here is, we think, substantial. While there has never been a suit solely for pre-remittance interest under the Interstate Commerce Act—probably because of the usually small amounts involved—courts have uniformly held that there is a right to such interest in cases where both the overcharge

4. *See Garfinkle v. Wells Fargo Bank*, 483 F.2d 1074, 1076-77 9th Cir. 1973); *Carlson v. Coca Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973).

(or undercharge) and interest were sought.[5] These courts typically have not discussed the origins of the interest wards, but it is at least arguable that the awards were grounded on the policy of the Act limiting a carrier's benefits to precisely those specified in the tariffs. The one court to discuss the issue, the Third Circuit in *Southern Pacific Co. v. Miller Abattoir Co.*, 454 F.2d 357 (1972), premised its holding awarding interest on such a reading of the Act. That was a suit involving a railroad's overcharge in violation of § 6(7) of the Act, a section corresponding to those in Part II limiting the charges carriers may levy. The court found that the "policy expressed" by the Act "require[d] that prejudgment interest be awarded." *Id.* at 362.

> [T]he only lawful charge for shipping the lambs is the full tariff charge. To allow the Railroad to recover without awarding prejudgment interest would be to diminish the tariff charge by an amount representing the value of the use of the money owed for the period prior to the judgment. Such a diminution would be contrary to § 6(7).

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5. Cases under Part II of the Act so holding are: *Fawley Motor Lines, Inc. v. Cavalier Poultry Corp.*, 235 F.2d 416, 419 (4th Cir. 1956); *T. & M. Transportation Co. v. Shattuck Chemical Co.*, 158 F.2d 909, 9-10-11 (10th Cir. 1947); *Montgomery Ward & Co. v. Roy Stone Transfer Co.*, 220 F.Supp. 137, 140 (W.D. Va. 1963), *vacated on other grounds*, 329 F.2d 172 (4th Cir. 1964). The I.C.C. has never decided this issue since it has no authority to award reparations in motor carrier cases. *See Smith v. Moland Bros. Trucking Co.*, 46 M.C.C. 762 (1947).

It does have such power when rail charges are at issue under Part I of the Act, and both the I.C.C. and courts have long upheld interest awards in such cases. *See, e.g., Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *Louisiana & Arkansas Ry. v. Export Drum Co.*, 359 F.2d 311, 317 (5th Cir. 1966); *Rutter & Co. v. Chicago & N.W. Ry.*, 36 I.C.C. 272, 280 (1915).

Id. The words "compensation" and "overcharge" in Part II are certainly susceptible of the same interpretation. Garrett's statutory claim here is not insubstantial.

TIME-DC, however, argues that the right to interest claimed by the plaintiff is not one arising under the Act, but one derived from the common law. Section 1337 uses the terms arising under an "Act of Congress"; in contrast, § 1331 grants jurisdiction for causes arising under the "laws" of the United States. The term "laws," it has been held, encompasses federal common law. *Illinois v. Milwaukee,* 406 U.S. 91, 98-101 (1972). But it is generally thought that "Act of Congress" in § 1337 limits the reach of the statute to cases arising under statutory law. *See Ivy Broadcasting Co. v. American Telephone & Telegraph Co.,* 391 F.2d 486, 489 (2d Cir. 1968); *Frenkel v. Western Union Telegraph Co.,* c27 F.Supp. 954, 958 (D. Md. 1971). If it is a federal common law right that appellant is asserting, then, there can be no § 1337 jurisdiction.

It is true that the Interstate Commerce Act does not in so many words declare that "pre-remittance interest shall be awarded." Such a principle is, however, at least inferable from the Act, and that is all that is necessary. In *Fielding v. Allen,* 181 F.2d 163 (2d Cir.), *cert. denied* 340 U.S. 817 (1950), the plaintiff's claim was that the Interstate Commerce Act inferentially created a private right of action to challenge I.C.C.- approved railroad mergers. The court held this claim arose under the *statute.* Judge Swan, writing for the court, rejected an argument similar to that put forth by TIME-D.C. here: "Nor need the federal statute upon which the claim is based expressly provide that the plaintiffs shall

have a remedy by way of suit." *Id.* at 166. It is enough that the statute provide the source of the right or duty claimed in the suit. *See Murphy v. Colonial Federal Savings & Loan Association,* 388 F.2d 609, 611, 615 (2d Cir. 1967).[6] To require more would establish an impossible and artificial line between statute and common law which nowhere in fact exists.

We hold that the claim here arises under the Interstate Commerce Act.[7]

Reserved and remanded.

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6. In *Murphy* the court held that a suit in which plaintiffs sought a right to inspect federal savings and loan membership lists arose under the Federal Home Loan Act because the right depended on "fleshing out" vague regulations specifying the right of members to vote by proxy.

7. According jurisdiction in this class of cases will not, it should be noted, impose any practical burdens on federal courts, a factor we are admonished to consider by *Gully v. First National Bank,* 299 U.S. 109, 117-18 (1936). Suits claiming solely pre-remittance interest on freight overcharges will undoubtedly be few. Moreover, the issue is purely a federal one, so that a federal forum is desirable.

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

PAUL M. GARRETT, Trustee in Bankruptcy for METROPOLITAN SHIPPERS' CLEARINGS CORP. OF WASHINGTON, *Appellant,* v. TIME-D.C., INC., *Appellee.*	No. 72-3042 ORDER OF SUBSTITUTION

Appeal from the United States District Court
Western District of Washington

Before: KILKENNY, TRASK and CHOY, Circuit Judges.

Paul M. Garrett, Trustee in Bankruptcy, is hereby substituted for appellant Metropolitan Shippers' Clearing Corp. of Washington, and hereafter all proceedings shall be prosecuted in the name of the trustee.

This substitution of parties is made on the court's own motion.

[Filed: June 4, 1974]

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL M. GARRETT, Trustee in Bankruptcy for METROPOLITAN SHIPPERS' CLEARINGS CORP. OF WASHINGTON, *Appellant*, v. TIME-D.C., INC., *Appellee*.	No. 72-3042 ORDER

Before: KILKENNY, TRASK and CHOY, Circuit Judges.

Appellee's motion that the appeal be dismissed is denied.

[Filed: October 23, 1974]

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

METROPOLITAN SHIPPERS' CLEARINGS CORPORATION OF WASHINGTON, *Plaintiff,* vs. TIME-D.C., INC., *Defendant.*	No. 246-72C2 MEMORANDUM DECISION

The plaintiff brings this action seeking a declaratory judgment. Plaintiff claims that certain overcharges by motor vehicle common carriers are owed to plaintiff's clientele, and that payment by the offending carrier should include interest, and that to date, overcharges paid by the offending carriers are for the principal amount but that the carriers do not pay interest.

The plaintiff has set forth the sum of $1,200.00 as the approximate amount owed by defendant to plaintiff's clients. To avoid dismissal of the action on the ground that the claim does not meet the jurisdictional requirement prescribed by statute, plaintiff contends that the Court should "interpret" the federal act providing that actions for overcharges may be brought in the Court. Title 49 U.S.C.A. § 304a(2).

In the instant case, no ambiguity is claimed because there is no statutory language that bears on

the particular contention by plaintiff save and except that actions for overcharges shall be brought in the Courts.

Title 28, § 2201, does not afford an independent basis for jurisdiction. *Skelly Oil Co., et al v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

The amount in controversy is alleged to be $1,200.00.

This Court lacks jurisdiction and must, therefore, dismiss the action.

IT IS SO ORDERED.

DONE BY THE COURT this 19th day of September, 1972.

WILLIAM N. GOODWIN
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of METROPOLITAN SHIPPERS CLEARINGS CORPORATION, et al., *Bankrupt.*	IN BANKRUPTCY No. 767-73B2 ORDER APPOINTING SPECIAL ATTORNEY TO PURSUE APPEAL

Under the petition of Paul M. Garrett, Trustee herein, for appointment of special counsel to pursue a pending appeal to conclusion, it appearing that Nicholas F. Corning is fully qualified, and not representing any interest adverse to the estate of Paul M. Garrett, Trustee, no notice of such application being necessary and sufficient cause therefor appearing, it is

ORDERED that Nicholas F. Corning, Esq., of Jennings P. Felix, Inc., P.S., be and is hereby appointed as special attorney to pursue the pending litigation on behalf of the bankrupt entitled *Metropolitan Shippers Clearings Corporation of Washington vs. Time-DC, Inc.* to final disposition on appeal in the Ninth Circut Court of Appeals with no

expense, costs or attorney's fees to be borne by the bankrupt estate.

DATED this 11 day of June, 1974.

SIDNEY VOLINN
Referee in Bankruptcy

Presented by:

s/ NICK S. VERWOLF
Counsel for Trustee

Agreed and Approved:

s/ NICHOLAS F. CORNING
Special Counsel

APPENDIX G

Section 41. Liability of corporation carriers and agents—Offenses and penalties—Jurisdiction—Departure from published rates—Receiving rebates—Anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof [15 § 77c; §§ 1-5, 5b-15a, 16, 17-23, 26, 27, 301-305, 306-327, 901-923, 1001-1022 of this title], which, if done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts [15 § 77c; §§ 1-5, 5b-15a, 16, 17-23, 26, 27, 301-305, 306-327, 901-823, 1001-1022 of this title], shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts [15 § 77c. §§ 1-5, 5b-15a, 16, 17-23, 26, 27, 301-305, 306-327, 901-923, 1001-1022 of this title], with reference to such persons, except as such penalties are herein changed. The wilful failure upon the part of any carrier subject to said acts [15 § 77c; §§ 1-5, 5b-15a, 16, 17-23, 26, 27, 301-305, 306-327, 901-923, 1001-1022 of this title] to file and publish the tariffs or rates and charges as required by said acts [15 § 77c; §§ 1-5, 5b-15a, 16, 17-23, 26, 27, 301-305, 306-327, 901-923, 1001-1022 of this title], or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or

discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof [15 § 77c; §§ 1-5, 5b-15a, 16, 17-23, 26, 27, 301-305, 306, 327, 901-923, 1001-1022 of this title] whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof [15 § 77c;§§ 1-5, 5b-15a, 16, 17-23, 26, 27, 301-305, 306-327, 901-923, 1001-1022 of this title], or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty-thousand dollars: Provided, That any person, or any officer or director of any corporation subject to the provisions of this act [§§ 41-43 of this title], or the act to regulate commerce and the acts amendatory thereof [15 § 77c; §§ 1-5, 5b-15a, 16, 17-23, 26, 27, 301-305, 306-327, 901-923, 1001-1022 of this title], or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such vio-

lation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act or regulate commerce or acts amendatory thereof [15 § 77c; §§ 1-5, 5b-15a, 16, 17-23, 26, 27, 301-305, 306-327, 901-923, 1001-1002 of this title], or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this act [§§ 41-43 of this title], shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this act [§§ 41-43 of this title], or for whom as consigner or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall

knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this act [§§ 41-43 of this title], shall in addition to any penalty provided by this act [§§ 41-43 of this title] forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total value of such consideration, so received or accepted, or both, as the case may be. (Feb. 19, 1903, c. 708, § 1, 32 Stat. 947; June 29, 1906, c. 3591, § 2, 34 Stat. 587.)

APPENDIX H

INTERSTATE COMMERCE COMMISSION
Office of the Secretary
Washington, D.C. 20423

March 20, 1972
RCG-1114

Mr. Mark B. Packer
Corporate Secretary
Merchants Shipper Credit
Corporation
4044 128th Avenue, S. E.
Bellevue, WA 98006

Dear Mr. Packer:

Thank you for your communication of March 1, 1972, requesting advice as to the obligation of carriers subject to the Commission's jurisdiction to pay interest on claims for refund of overcharges.

Part I and III of the Interstate Commerce Act confer authority upon the Commission to award reparation in instances where it is found that the provisions therein have been violated.

In *Rutter & Co., v. C. & N. W. Ry.,* 36 I.C.C. 272, 280, and *American Enameled Brick & Tile Co., v. Raritan River R. R.,* 39 I.C.C. 653, 657, the Commis-

sion held that if overcharges exist, they should be promptly refunded by carriers with interest without an order from the Commission. The Commission also held in *International Lumber Co., v. C. N. Ry.*, 40 I.C.C. 283, 284 and *Lexington Flouring Mills v. Missouri Pacific Railway Company Et Al.*, 48 I.C.C. 687, 688, that carriers should pay interest on all unsettled claims for overcharges from the date the charges are improperly collected until the overcharges are refunded.

However, neither Part II nor Part IV of the Act, pertaining to motor carriers and freight forwarders respectively, confers authority upon the Commission to award reparation in instances where it is found that the provisions contained therein have been violated.

When the complainant asked the Commission to indicate the rate of interest which should be paid by defendants on the outstanding overcharges in *Smith v. Moland Bros. Trucking Co.*, 46 M.C.C. 762, 764, the decision of the Commission was that since it did not have the power to award reparation under Part II of the Act, the matter of interest was beyond the scope of the instant proceeding. In *Halliburton Company v. Consolidated Copperstate Lines, Et Al.*, 335 I.C.C. 201, 208, the Commission held that under Section 294(c) of the Interstate Commerce Act the Commission is empowered to investigate whether any motor carrier has failed to comply with any provision to which it is subject; and, under Section 217(b) of the act, motor common carriers are bound to enforce and collect the exact applicable rates and charges in effect and on file in their tariffs. Accordingly, while the Commission has no authority to entertain an action for overcharges, the Commission

has authority to make an administrative determination of the applicable rates on past shipments.

It is hoped that the above discussion of the matter will prove helpful to you.

Sincerely yours,

ROBERT L. OSWALD
Secretary